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In the

Supreme Court of the United States

October Term, 1937

No. 300

THE ST. LOUIS, BROWNSVILLE AND MEXICO RAILWAY COMPANY, GUY A. THOMPSON, TRUSTEE, ET AL.,
Petitioners,

vs.

BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS

A. B. COLE,
of Rentfro & Cole,
Brownsville, Texas,
A. L. REED,
CARL B. CALLAWAY,
of Callaway & Reed,
Dallas, Texas,
Their Attorneys.

Dated: February 17, 1938.

Address: CALLAWAY & REED,
1902 Santa Fe Building,
Dallas, Texas.

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BROWNSVILLE NAVIGATION DISTRICT OF CAMERON COUNTY, TEXAS, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS

OPINION BELOW

The opinion of the District Court was not reported. The opinions of the Circuit Court of Appeals are reported in *Brownsville Navigation District, et al., v. St. Louis, B. & M. Railway Co., et al.*, 91 Fed. (2d) 502.

PRELIMINARY STATEMENT

Attention of this honorable court is respectfully directed to the "specifications of errors" as filed by the petitioners in this case. (See pages 8 and 9 of brief for petitioners.) It is not believed that these "specifications of errors" or assignments of errors comply with the rules of this honorable court.

(28 U.S.C.A., Sec. 862; *Local 167 of International Brotherhood of Teamsters, Chauffeurs, Stablemen and*

Helpers of America, et al., v. United States, 291 U. S. 293; *American Surety Company of New York v. Fischer Warehouse Company*, 88 Fed. (2d) 536; *Wallace Wood, Jr., v. A. Wilbert's Sons Shingle & Lumber Co.*, 226 U. S. 384, and *People of the State of New York v. Kleinert*, 268 U. S. 646.)

It is particularly urged that under the "specifications of errors," as filed, and taking into consideration the rules of this honorable court, this court should not at this time consider the matters raised under points 1 and 3 as contained in petitioners' brief. It is our contention that petitioners seek to raise and discuss under these two points matters for which no proper predicate has been laid in this appeal.

Point 1 contained under "Argument" in petitioners' brief is found on page 9 of such brief and point 3 is found on page 26.

STATEMENT OF THE CASE

Petitioners in their brief repeatedly placed the respondents in the position of relying upon contentions upon which the respondents do not rely, insofar as this appeal is concerned.

In order that our position may be clearly understood, we point out as follows:

1. Respondents do not raise and do not rely, in any manner whatsoever, upon any question of discrimination in any published rule or rate of either of the Petitioner Carriers.

2. Regardless of the duty of Respondent Carriers, *under rates and car service rules on file with the Interstate Commerce Commission*, to permit the carrying of their equipment into a foreign country, respondents insofar as this appeal is concerned do not rely upon any contention that there is any obligation on either of the petitioner railroads to furnish equipment for movement into a foreign country, viz. Mexico.

Respondents in the lower court complained of two things:

a. The failure and refusal of the carriers to transport, under rates and regulations published and on file with the Interstate Commerce Commission, shipments in cars owned by other carriers, which cars were loaded and tendered to them for shipment.

b. The failure of the petitioner carriers to furnish transportation (including equipment) as defined in Section 1 (3) of the Interstate Commerce Act, for shipments of respondents, under rates and regulations published and on file with the Interstate Commerce Commission.

The shipments referred to in both (a) and (b) above were shipments originating at a point in the United States, destined to a connection with the National Railways of Mexico at the international bridge.

The only question presented on this appeal is the jurisdiction of the District Court under Section 49 of the Interstate Commerce Act (Art. 49, Title 49, U. S. C.A.) to issue a mandamus commanding that petitioners

perform their transportation duties as defined in Section 1 of the Interstate Commerce Act, Title 49, U. S. C. A.) under rates published and on file with the Interstate Commerce Commission.

In this connection the Circuit Court of Appeals in its opinion in this case stated as follows:

> "The sole question presented on this appeal is the jurisdiction of the district court to issue a writ of mandamus requiring appellees to perform their transportation duties *under rates published and filed with the Interstate Commerce Commission.* (Italics ours.)

We cannot accept the statement of the case as submitted by the petitioners and therefore briefly outline the case as follows:

The Brownsville Navigation District of Cameron County, Texas, (hereinafter referred to as the Port of Brownsville) is a port navigation district similar in every respect to those existing at other Texas ports, such as Corpus Christi, Houston, etc. The Port of Brownsville was incorporated under the laws of the State of Texas for the purpose of creating a navigation district in Cameron County, Texas. For that purpose the taxpayers of the Port of Brownsville in conjunction with the United States Government invested $5,788,630 in the dredging of a canal from Brazos, Santiago Pass, to the turning basin, about 5 miles from the center of Brownsville. Of this amount $2,853,000 was paid by the taxpayers and citizens of the Port of Brownsville. There is some $740,000 invested in facilities at the turning

basin for the purpose of affording the necessary means of interchange of commodities and commerce between land and water carriers. The ship channel thus constructed is 17 miles long and the turning basin is 5 miles from the geographical center of the city of Brownsville (R. 4-5). The Port of Brownsville was opened to the commerce of the nation on May 16, 1936 (R. 102).

Respondents, F. A. Lallier and J. G. Philen, Jr., are shippers' agents, forwarding agents, freight brokers and stevedores engaged in the business of handling freight at the Port of Brownsville for transshipment by water and for transportation by railroad to and from the Republic of Mexico, as well as to and from origins and destinations in the United States (R. 130-137). (Hereinafter called shippers' agents).

Petitioner, the St. Louis, Brownsville and Mexico Railway Company, Guy A. Thompson, Trustee, operates a railroad from Houston through several counties into Brownsville, Texas. It serves the ports of Houston, Corpus Christi and Brownsville (R. 106-80a). This carrier is operated by Guy A. Thompson, Trustee, as the result of a proceeding in the District Court of the United States, Eastern Division, Eastern Judicial District of Missouri, Cause No. 6935, a Proceeding for the Reorganization of a Railroad (R. 3). That court, having granted permission to sue the trustee in the District Court of the Southern District of Texas in the matter here presented to the court (R. 23). (Hereinafter called the Missouri Pacific.)

The petitioner, Port Isabel & Rio Grande Valley Railway, is a corporation organized under the laws of the State of Texas with headquarters at Brownsville, Cameron County, Texas, and it operates a railroad approximately 26½ miles long between Brownsville and Port Isabel, wholly in Cameron County, Texas. It has a switch connection with the facilities at the turning basin of the Port of Brownsville and it connects with petitioner, Missouri Pacific, at Brownsville and forms a connecting line of transportation from the Port of Brownsville to the interchange with the National Railways of Mexico in the City of Brownsville (R. 6-7). (This petitioner will hereinafter be called the Port Isabel line.) See also R. 70-a for a graphic description of the location of the turning basin, the line of the Port Isabel Railway and that of the Missouri Pacific and its connection with the National Railways of Mexico at Matamoros. The bill of complaint (R. 2-19) alleges:

1. That the defendants are refusing to transport the commodities handled through the Port of Brownsville between that port and the interchange with the National Railways of Mexico through the gateway of Matamoros, Tamaulipas, Mexico. (Par. VI, R. 12; Par. VII, R. 13-14; Par. XIV, R. 17.)

2. That defendant, Missouri Pacific, has always had and does now have joint arrangements for the through movement of traffic into and out of Mexico and for the interchange of American railway equipment as between that defendant and the National Railways of Mexico for such through transportation (Par. IV, R. 10).

3. That there are lawfully published rates on file with the Interstate Commerce Commission covering the transportation of the commodities here involved between the Port of Brownsville and the interchange with the National Railways of Mexico at the gateway of Matamoros, Tamaulipas, Mexico, and the gateway of Brownsville, Cameron County, Texas (Par. II, R. 7-8).

4. That defendants are refusing to transport the commodities or to furnish equipment for their transportation under the lawfully published rates on file with the Interstate Commerce Commission (Par. II. R. 9; Par. VI, R. 12; Par. VII, R. 13-14; Par. VIII, R. 14; Par. XIV, R. 17).

5. It is alleged that the shippers and respondents have at all times tendered the commerce to the defendant carriers and expressed their willingness and readiness to pay the lawful published rates for the transportation thereof between the Port of Brownsville and the interchange with the National Railways of Mexico at Matamoros, State of Tamaulipas (Par. XII, R. 16).

6. It is alleged that petitioner, Missouri Pacific, is operating under the existing joint arrangements for the interchange of traffic with the National Railways of Mexico through other ports and other gateways, but is refusing and declining to accord to the shippers and the Port of Brownsville the same treatment and the same benefits of existing arrangements for such interchange and transportation (Par. IV, R. 10).

7. That the Missiouri Pacific is furnishing equipment to other ports and other gateways for transportation into Mexico under its joint interchange arrangements with the National Railways of Mexico and is declining to furnish equipment for the same purpose to the Port of Brownsville (Par. VI, R. 12).

8. That the Missouri Pacific declined to permit defendant, Port Isabel Railway, to load equipment that was already in its possession and already at the Port of Brownsville for the transportation of commodities from the Port of Brownsville to the interchange with the National Railways of Mexico (Par. VII, R. 13-14).

9. The prayer for relief asked that the district court grant an order for the issuance of a writ of mandamus commanding said respondents:

a. To move and transport the traffic herein described, and

b. To furnish adequate and sufficient cars for its transportation to and from and between Matamoros, Tamaulipas, Mexico, and the Port of Brownsville, Cameron County, Texas (Par. XVIII, R. 19).

THE EVIDENCE SUBMITTED TO THE LOWER COURT SUSTAINED THE ALLEGATIONS OF RESPONDENTS

We shall give only a few illustrations of the evidence which is undisputed with respect to the refusal to trans-

port at published rates and the refusal to furnish equipment for transportation.

1. The instance of the steel billets originally booked for movement through the Port of Brownsville into Monterrey, Mexico, were diverted to Corpus Christi by reason of the refusal of the petitioners to transport. At Corpus Christi, petitioner, Missouri Pacific, permitted its equipment to be loaded and transported by the Texas-Mexican Railway from Corpus Christi to Laredo and there delivered to the National Railways of Mexico for transportation to Monterrey, Nuevo Leon, Mexico. The specific car numbers showing the American cars in which the steel billets moved are set forth in the evidence (R. 104-105).

2. When these same cars (R. 104-105) reached their destination in Mexico and were made empty, they could be reloaded for the transportation of commodities to any American gateway or port except the Port of Brownsville; because the Missouri Pacific refused to transport such cars upon arrival at the gateway of Matamoros-Brownsville (R. 105-106).

3. The bill alleges that the shippers tendered loaded cars to petitioners, and gives car numbers showing cars loaded at the Port of Brownsville by shippers seeking to use that port, which were tendered to petitioners for transportation under published rates and it alleges that petitioners refused to transport such cars containing such commodities (R. 13-14). The evidence specifically sustained this allegation (R. 110-111).

4. It is not denied that the National Railways of Mexico are parties to a tariff on file with the Interstate Commerce Commission providing for interchange between the American railroads and that carrier, and that these tariffs provide for that interchange at all gateways, including the gateway of Brownsville-Matamoros (R. 107; R. 128).

5. It is not denied that the tariffs covering the transportation charges between Port Brownsville and the interchange with the National Railways of Mexico at the International Bridge are lawfully on file with the Interstate Commerce Commission, and that they do provide for the necessary charges for such transportation (R. 115-123).

PETITIONERS FILED PLEA TO JURISDICTION OF THE COURT AND IT SUSTAINED THAT PLEA

Petitioners filed a plea to the jurisdiction of the court, contending that it was a matter that required initial submission of the question involved to the Interstate Commerce Commission, and that the District Court had no jurisdiction to require the petitioners to perform their transportation duties (R. 25, 32).

The district court in a memorandum opinion sustained that plea and held that the matter involved was one of an administrative nature to be submitted to the Interstate Commerce Commission (R. 39).

Respondents petitioned for appeal, which was granted (R. 43, 45).

The majority of the Circuit Court of Appeals for the Fifth Circuit reversed the judgment dismissing the petition and remanded the case to the District Court for further proceedings (R. 141-152).

SUMMARY

We will attempt to answer the argument of petitioners in substantially the form and order in which it is submitted in their brief. Our argument wil cover the following points:

A. That respondents are entitled to receive from the petitioner carriers transportation service from the Port of Brownsville to the international bridge, this service to be rendered under rules and regulations filed by said carriers with the Interstate Commerce Commission.

B. That such transportation service includes both the actual movement of loaded cars, either belonging to the petitioner carriers or other railroads, and also the furnishing of equipment for such transportation service.

C. That the service to which the respondents are entitled and the demands made upon the carriers for such service involve only the performance by the carriers of acts which they are obligated to perform under tariffs which they have filed with the Interstate Commerce Commission and do not involve in any manner whatsoever any interpretation of such tariffs or any administrative questions.

D. Mandamus is a proper remedy in this case.

ARGUMENT

In the beginning, we desire to direct particular attention of the court to three things.

1. The record in this case shows not only that the petitioner carriers refused to furnish equipment to the respondent shippers for the transportation of commodities, but that they also refused to transport for the benefit of such shippers loaded cars owned by railroads other than the petitioner carriers which were tendered to the petitioner carriers at the Port of Brownsville and which had been moved into the Port of Brownsville.

Specific instances of this are shown by the letter from the Missouri Pacific and Southern Pacific to the Rio Grande attached to the affidavit of Mr. F. W. Hofmokel (R. 111) where it is definitely stated that in regard to cars not belonging to petitioner carriers "we cannot accept the cars loaded for points in Mexico without the authority of officials of the lines delivering the cars to us." In the case of car MP 83054 loaded with sheet steel, and other instances, shippers endeavoring to use the Port of Brownsville have been requested and forced by petitioners to unload cars because of the refusal of petitioners to transport them. (R. 110.)

2. The shipments involved, whether in cars owned by the petitioner carriers or by other railroads, were shipments to be moved from the Port of Brownsville to a connection at the international bridge.

3. The actual tariff covering such shipments is shown in the record at page 94 and reads in part as follows:

> "Commodities * * * all carload freight, except as otherwise shown, to or from points in Mexico * * * BETWEEN * * * (c) interchange connections with other lines * * * AND * * * interchange connection of the StLB&M Railway with the Brownsville & Matamoros Bridge Company."

It is the contention of the respondents that the only thing involved in this case is the enforcing of this tariff of the petitioner carriers and that for this reason there is no administrative matter of any kind whatsoever involved requiring submission to or decision by the Interstate Commerce Commission of any preliminary question. It is further our contention that under Section 1, Paragraph 3 of the Interstate Commerce Act, the transportation service to which respondent shippers are entitled under the above mentioned tariff includes both the actual transportation of cars and the furnishing of equipment.

We call attention to the fact that the allegations of the bill of complaint show that the appellees are connecting carriers (R. 7). That the commerce which appellants seek to have transported over their joint line is a through movement between the Port of Brownsville and the interchange with the National Railways of Mexico (R. 10-12). That both appellees have published and on file with the Commission tariffs naming per car charges for such through transportation (R. 7, 8). Therefore, there is a through route composed of the two lines of railway. The

through rate is composed of two separately published factors but it is none the less a through rate and the mere fact that the through rate for the through transportation is composed of the combination of the separately established local rates does not affect the joint responsibility for the through transportation. See *Atlantic Coastline Railway Company v. Smith Bros.*, 63 Fed. (2d) 747, certiorari denied 289 U. S. 761. At 748 in that opinion the court states that the rule of the Interstate Commerce Commission, fixing joint responsibility for violations of the act for through routes where there are only combination of local rates, has the approval of the courts. The court thereafter cited the following cases in which that rule of the Commission had been approved:

Louisville & Nashville Railway Co. v. Sloss-Sheffield Steel & Iron Co., 269 U. S. 217.

News Syndicate Co. v. New York Central Railroad Co., 275 U. S. 179.

Lewis-Simas-Jones Co. v. Southern Pacific, 283 U. S. 654.

Kanawha Black Band Coal Co. v. Chesapeake & Ohio Railroad, 197 W. Va. 469.

The opinion of the court in the Smith Brothers case above cited was cited with approval by the fourth Circuit Court of Appeals in *Atlantic & Y. Railway Co. v. Carolina Button Corp.*, 74 Fed. (2d) 870.

Section 6, paragraph 1 of the Act specifically defines through routes in connection with which combination of

local rates are established and collected. That section provides as follows:

> "Every common carrier subject to the provisions of this chapter shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate has been established. *If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares, and charges applied to the through transportation.*" (Italics ours.)

Referring specifically to this section, this Court in *Kansas City Southern Ry. Co. v. Albers Commission Co.*, 223 U. S. 573, (p. 597) stated:

> "In every substantial sense, local rates and joint through rates were placed on the same level."

In the case of *U. S. v. Illinois Central Ry.*, 263 U. S. 515, the specific question was passed on as to whether or not discrimination under the statute by connecting carriers was affected by the manner of publishing the rates. In that case, the question presented was whether or not the Illinois Central Railroad could be held responsible for the discrimination since it charged only its separately established factor and since the short line railway connecting with it charged its separately established fac-

tor. Speaking for the court, Mr. Justice Brandeis at page 527 stated:

> "The rate to the short line point is not a joint rate, but a combination of the trunk line rate to the junction and the short line local rate. The distinction is without legal significance in this connection. A through route was established; and the transportation is performed as the result of this arrangement between the carriers, express or implied."

REPLY TO PETITIONERS' POINT I

The argument made by petitioners to the effect that furnishing the services demanded by respondents would result in transportation to points outside of the United States is not tenable. All of the services that petitioners would be required to render would be rendered in the United States. Even if, after such services have been performed, the cars might be taken into a foreign country (with the consent of petitioner carriers or under the Car Service Rules of the Association of American Railroads on file with the Interstate Commerce Commission) petitioners will not be allowed for this reason, to evade the provisions of the Interstate Commerce Act and their common law duty in this regard. The cases of *News Syndicate Co. v. New York Central Railway Company*, 275 U. S. 179 and *Lewis-Simas-Jones Company v. Southern Pacific Co.*, 283 U. S. 654, hold that regardless of the fact that part of the transportation might occur without the boundaries of the United States, the carriers are obligated to perform their lawful duties in regard to the transportation service within the United States.

Petitioners have attempted to distinguish these cases on the ground that the rates involved herein are not joint through rates but are separately established rates. Again, the position taken by petitioners is, under the law, not tenable.

These authorities show that carriers cannot defeat their obligations by refusing to join in the tariff of the connecting lines and thereby calling the total sum collected a combination of local switching rates rather than through or joint rates.

REPLY TO PETITIONERS' POINT II

The basis of this appeal is presented in petitioners contention that the question before the court is an administrative one and not subject to the orders of the court before recourse is had to the Interstate Commerce Commission.

The only issue presented to the court is the duty of petitioners to transport commodities tendered them at the published rates lawfully on file with the Commission. Related to that is the matter of furnishing cars for such transportation. Does the duty to transport include the duty to furnish equipment for such transportation? There is no dispute that respondents have tendered to petitioners commodities to be transported and that there are tariffs on file with the Intersate Commerce Commission providing for the transportation for which the respondents have asked. We presume that petitioners are willing to accept as a brief and true statement of their case the opinion by Hutcheson, Circuit Judge, who dis-

sented from the opinion of the majority. He says in summing the case this:

> "But this evidence was not needed, for he (the trustee) admits, indeed insists, that he has not furnished, and does not intend to furnish, cars for this movement. He denies that there is any law or regulation which compels him to, and insists that it is not discrimination to furnish cars for Mexican shipment where his road gets a line haul, and to refuse to furnish them where it gets only a meager switching charge." (Parenthetical part ours.)

We submit to the court that the amount of revenue realized or the length of haul petitioners would perform is no criterion, but the question is: Do they have a tariff or common law duty providing for them to render this service? If so, have they refused to perform the service?

Section 1, paragraph 3 of the Interstate Commerce Act (Title 49, U. S. C. A.), defines the term transportation as follows:

> "The term 'transportation' as used in this Act shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported."

Section 1, paragraph 4 of the Interstate Commerce Act (Title 49, U. S. C. A.), states:

> "It shall be the duty of every common carrier subject to this chapter engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor."

Thus definitely petitioners are under a duty to furnish transportation upon reasonable request and that transportation includes locomotives, cars and other vehicles. This has been upheld in numerous cases. See *Southern Railway Co. v. D. L. Reid, et al.*, 222 U. S. 424; *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. Edward Dettlebach*, 239 U. S. 588. The same interpretation has been placed upon the act by the state courts. *Atchison, Topeka & Santa Fe Ry. v. Smyth*, 189 S. W. 70; *Ft. Worth & Denver City Railway Co. v. Strickland*, 208 S. W. 410.

It is alleged in the original bill that petitioners have published tariffs covering the transportation to and from the interchange at the international bridge and the Port of Brownsville composed of separately established rates of $3.15 per car by the Missouri Pacific lines and $8.10 per car by the Port Isabel line. These tariffs are on file with the Commission covering the transportation of the commodities which respondents seek to have transported by petitioners (R. 7-8). Petitioner Missouri Pacific lines has joint tariff arrangements with the National Railways of Mexico for the interchange of traffic over the international bridge at Brownsville and there are published charges on file with the Interstate Commerce Commission covering this interchange (R. 8). This is not denied. With petitioners having a clear duty to perform the transportation for which they have tariffs on file and the clear wording of the Interstate Commerce Act and the opinions of the Courts that transportation in-

cludes the furnishing of equipment, there can be nothing else involved in this suit other than the question of whether the district court can require a carrier to perform service which it has stated in its tariff that it will perform and which, under the terms of the Interstate Commerce Act and by virtue of its common law duty, it is obligated to perform. The Federal Courts are the only authority which can act in this situation. Acting upon such a case does not require any inquiry into the question of the reasonableness of the rates or regulation or charge. Respondents have at all times been ready, willing and able to pay the tariff charges of petitioners and have never questioned them as being unreasonable or prejudicial. Respondents seek to require performance under a rule, rate or practice promulgated and filed with the Interstate Commerce Commission which is fair and reasonable on its face. This is a judicial question. The Interstate Commerce Commission held in *C. S. Wells & Son v. Chicago, Burlington & Quincy Railroad*, 161 I. C. C. 145 that it does not have jurisdiction in a situation as is presented in the instant case. The same conclusion was reached by this court in *United States v. Pennsylvania Railroad Co., 242 U. S. 208*. Jurisdiction over such suit is in the State or Federal Court. *Pennsylvania Railroad Co. v. Puritan Coal Co., 237 U. S. 121.*

The case of *Pennsylvania Railroad Co. v. Puritan Coal Co.* will hereinafter be discussed in detail.

We pass to a discussion of the cases cited and quoted from in the argument of petitioners.

The first case cited by the petitioners is that of *Great Northern Railway Company v. Merchants Elevator Company*, 259 U. S. 285. The facts as stated by the court in that case, however, definitely establish it as an authority for the position assumed by respondents. They are fully stated as follows: (p. 288)

> "This action was brought by the Merchants' Elevator Company in a state court of Minnesota against the Great Northern Railway Company and the Director General to recover $80 alleged to have been exacted in violation of the carrier's tariff. That sum had been demanded by the carrier, under Rule 10 of its tariff, as a reconsignment charge, at the rate of $5 a car, for 16 cars of corn shipped from points in Iowa and Nebraska to Willmar, Minn., and after inspection there rebilled to Anoka, a station beyond. The tariff rate from the points of origin via Willmar to Anoka was the same as to Willmar. Willmar had been named as destination in the original bill of lading, only because it is the place at which grain coming into the state by this route is inspected and graded under the laws of Minnesota and of the United States, and the carrier knew, or should have known, that fact. Immediately after inspection, disposition orders were given, and the original bills of lading were surrendered in exchange for billing to Anoka. Rule 10 read:
>
> " 'Diversion of reconsignment to points outside switching limits before placement: If a car is diverted, reconsigned or reforwarded on orders placed with the local freight agent or other designated officer after arrival of car at original destination, but before placement for unloading, * * * a charge of $5.00 per car will be made if car is diverted, reconsigned or reforwarded to a point outside of switching limits of original destination'."

> "The shipper contended that the case was within the exception known as exception (a), as amended by supplement 1, which provided that rules (including Rule 10) shall not apply to: '(a) Grain, seed (field), seed (grass), hay or straw, carloads, held in cars on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto.'
>
> "Whether the charge was payable depended solely upon a question of construction; that is, whether the body of the rule or the exception to it applied. On this question there was room for reasonable difference of opinion. The carrier, relying particularly upon Texas & Pacific Ry. Co. v. American Tie & Timber Co., 234 U. S. 138, 34 Sup. Ct. 885, 58 L. Ed. 1255, and Loomis v. Lehigh Valley R. R. Co., 240 U. S. 43, 36 S. Ct. 228, 60 L. Ed. 517."

After the court had concluded the comparison of these cases with the case before it, it stated its conclusion with respect to the matters involved as follows: (p. 294)

> "In the case at bar the situation is entirely different from that presented in the American Tie & Timber Co. Case, or in the Loomis Case. Here no fact, evidential or ultimate, is in controversy, and there is no occasion for the exercise of administrative discretion. The task to be performed is to be determined by the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary."

In a like manner, the only situation presented to this court is, first, whether or not there is a duty resting upon appellees to transport the commodities tendered

them by appellants. That question is determined by an examination of the provisions of the act and the published tariffs lawfully on file with the Commission. No need exists for any other examination or the establishment of any other facts. Appellants do not seek to have any tariff rate, rule or regulation changed or any established.

The next case cited is that of *Texas & Pacific Railway Company v. Abilene Cotton Oil Company*, 204 U. S. 426. That case involved a question of the lawfulness of existing rates, rules and regulations. It didn't involve the obligation of the carriers to transport commodities tendered them under published tariffs. It was an attack upon the published rate as unreasonable. In other words, the discrimination, preference and unreasonableness complained of did not grow out of a refusal to comply with the published rate, but grew out of the rate itself, and in order to effect relief it was necessary for the court to legislate a new and reasonable rate based upon plaintiff's evidence in that case. Plaintiff had paid only the published and legal rate. Its commerce had moved on the published and legal rate. The relief sought was a lower rate than that contained in the published tariff.

In the instant case, we are seeking only to have the respondent carriers perform their transportation duty and appellants are ready and willing and have at all times tendered to respondents their lawfully published charges for such transportation. The opinion in the *Abilene Cotton Oil case* shows that it cannot possibly

have any connection whatever with the situation here presented to the court. We call attention to the following quoted from that opinion (p. 430):

> "The oil company, the defendant in error, sued to recover $1,951.83. It was alleged that, on shipments of car loads of cotton seed, made in September and October, 1901, over the line of the defendant's road from various points in Louisiana east of Alexandria, in that state, to Abilene, Texas, the carrier had exacted, over the protest of the oil company, on the delivery of the cotton seed, the payment of an unjust and unreasonable rate, which exceeded, in the aggregate, by the sum sued for, a just and reasonable charge. There were, moreover, averments that the rate exacted was discriminatory, constituted an undue preference, and amounted to charging more for a shorter than for a longer haul. Besides a general traverse, the railway company defended on the ground that the shipments were interstate, and were, therefore, covered by the act of Congress to regulate commerce. It was averred that, as the rate complained of was the one fixed in the rate sheets which the company had established, filed, published, and posted, as required by that act, the state court was without jurisdiction to entertain the cause, and, even if such court had jurisdiction, it could not, without disregarding the act to regulate commerce, grant relief upon the basis that the established rate was unreasonable, when it had not been found to be so by the Interstate Commerce Commission."

The next case cited is *Baltimore & Ohio Railroad Company v. U. S.*, 215 U. S. 481. It likewise involved litigation to modify or change for the benefit of the Pitcairn Coal Company the existing established and published rules governing the distribution of coal cars in time of car shortage. It, therefore, involved both paragraphs

12 and 15 and not paragraphs 3 and 4 of the act. The Court stated (p. 482):

> "To decide the merits of this case will require us to determine the legality of the regulations of the B. & O. Railroad Company by which that company distributed cars to coal mines along the line of its road in case of car shortage."

The legality of the regulations themselves constituted the merits of that case. It was not a proceeding to enforce the regulations fair on their face. It was admitted that Pitcairn received all the cars to which it was entitled under the established regulations of the B. & O. Railroad. The court described the regulations of the B. & O. Railroad in great detail and later on, with respect to these regulations it stated (p. 495):

> "But the reports of the Interstate Commerce Commission show that, on a complaint made to that body on the subject of the system of mine rating of the Baltimore & Ohio Railroad Company, the Commission, before the decision of the circuit court of appeals in this case was announced, had expressly refused to hold that the system was either preferential or prejudicial within the act to regulate commerce. In that report, speaking of the Baltimore & Ohio system of mine rating, it was said (14 Inters. Com. Rep., p. 94):
>
> " 'This method of rating mines was adopted by the defendant in 1902, after a careful examination of the various systems in force on other lines. It was intended as a compromise between ratings based on physical capacity only and ratings based on commercial capacity only.'

"And after elaborately weighing the matter, it was said (p. 95):

"'In combining the two systems, the defendant has adopted a middle ground, apparently upon the thought that neither the physical nor the commercial capacity is always a fair test. We are not prepared, on this record, to say that there is no force in that view, and that a system of mine rating based upon a combination of the physical and commercial capacities of the several mines does not more closely approximate the actual car requirements of the mines than a system based upon physical capacity only'."

That case arose under Section 1, Paragraph 12 (Title 49, U. S. C. A.) That paragraph of Section 1 relates wholly to the distribution of coal cars. It provides as follows:

"It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States."

Under that paragraph the carriers were required to establish and publish reasonable rules with respect to the distribution of coal cars. These rules had been published and the Pitcairn Coal Company were dissatisfied with such rules as they were published. It sought to change these rules by a proceeding in the court and necessarily the Supreme Court held that the matter of prescribing just and reasonable rules and regulations to conform to the provisions of Paragraph 12, Section 1, constituted an administrative question and that jurisdiction resided only in the Commission and not in the courts. There is no such question presented here.

The next case cited by petitioners is *Morrisdale Coal Company v. Pennsylvania Railroad Company*, 230 U. S. 304. It involved the reasonableness of existing and published car service rules that had been filed with the Interstate Commerce Commission in compliance with the provisions of Paragraph 12, Section 1, of the act hereinabove quoted. The coal company sought to have the court issue an order requiring the railroad to modify its rules and regulations so that in the distribution of coal cars, as required by that paragraph of the act, privately-owned equipment would be counted and deductions made in the distribution of railroad-owned equipment because of the supply of privately-owned cars available to certain coal mines. The rules published and on file with the Commission did not require the counting of privately-owned

equipment. The court in discussing the facts of that case stated (p. 309):

> "When there was a car shortage, the Pennsylvania Railroad allotted to eah mine a percentage of cars assigned to the district, calculated according to the capacity of the mine.
>
> "On this basis the Morrisdale Coal Company was entitled to about 4.8 per cent and the Berwind-White Company to about 18 per cent."

further (p. 311):

> "Plaintiff admitted that if the Berwind-White Company was entitled to the use of their private cars, without counting them against what it was entitled to under the percentage, then the Berwind-White Company did not get an excess of their percentage. It further admitted that if fuel cars of the Pennsylvania Railroad, and fuel cars of foreign railroads, consgned to particular mines, were not to be counted against such mines, then plaintiff had no cause of complaint, inasmuch as it had received its percentage of the balance or System cars."

With reference to this situation the court stated (p. 313):

> "In view of the decision in the Abilene, Pitcairn and Robinson Cases it is unnecessary again to discuss the statute, or do more than say that in this case the plaintiff was not entitled to maintain its action without producing an order of the Commission that the rule adopted by the Pennsylvania Railroad was unreasonable.
>
> "The plaintiff, however, seeks to take the case out of the principle of those decisions, insisting that this is a suit for damages occasioned by a violation of the rule; and that, therefore, without any order of the Commission, it is entitled to institute a suit for the recovery of damages resulting from

the failure to distribute cars according to the method established by the railroad itself. The record, however, does not sustain this position, for the evidence does not show any breach of the rule or any failure to deliver to the Morrisdale Company all of the cars to which it was entitled under the method of allotment in force between 1900 and 1906. On the contrary, it was admitted at the hearing that there had been no discrimination against the plaintiff in the application of the rule, the complaint being that the basis of allotment was unreasonable, and that *all cars in the district* should be distributed according to the capacity of the mine, without deducting private cars, foreign fuel cars, or the carrier's own fuel cars. Whether this should be done as a general rule, or under the peculiar conditions prevailing on defendant's road at that time, was, as we have seen, an administrative question, and to be decided by the Commission as preliminary to the right to maintain this suit. The circuit court rightly held that until this was done it had no jurisdiction as a Federal court of the cause of action sought to be enforced.'" (Italics ours.)

The question submitted to the court below did not ask that any rule, regulation, rate or tariff be in any way modified or changed. Therefore, the *Morrisdale Coal Company case* is not applicable and has no bearing upon the issues here involved.

The next case citd by the petitioners is that of *Pennsylvania Railroad Company v. Clark Bros. Coal Mine Company*, 238 U. S. 456. It involved the question of the effect of electing to pursue remedies. The question involved was whether or not Clark Bros. could pursue its remedy before the Interstate Commerce Commission under Section 9 and also at the same time prosecute a proceeding in a

state court involving the identical matter that was presented to the Commission. In that case Clark Bros. had filed a complaint with the Commission seeking reparation as damages for the alleged discrimination in the distribution of coal cars. Prior to the decision by the Commission, Clark Bros. also filed a suit in the state court seeking damages for the same acts. Before the trial in court the Interstate Commerce Commission rendered its decision. Clark Bros. being dissatisfied with the results of that decision, sought to pursue the case in the state courts. The court held that the decision of the Commission was binding and that neither the state courts or any other court could reach a different conclusion and award more damages than those fixed by the Commission in its opinion and order. The entire question presented in the case related, however, not to the enforcement of the existing rules, but sought to obtain a modification of the rules for the benefit of Clark Bros. Coal Mining Co. The Interstate Commerce Commission found that the rules were discriminatory and that plaintiff had been damaged in the amount of $31,127.96. The state court awarded damages with reference to the same acts and the same period in the amount of $124,443.00. With reference to Section 9 of the Act and the real point involved, namely, the election of remedies, the court stated (p. 470):

> "This provision defines the remedies to which a person in the situation of the plaintiff is entitled, and the terms of the provision clearly indicate that these remedies are exclusive. The express requirement of an election between the proceeding before

> the Commission and suit in the Federal court leaves no room for the conclusion that there is an option in such case to resort to the state court."

That case is not applicable to the situation here under consideration and it does not dispose of the issues presented to the court below in the petition of respondents.

The next case cited is that of *Mitchell Coal & Coke Company v. Pennsylvania Railroad Company*, 230 U. S. 247. It involved the reasonableness of an allowance to shippers of coal for the performance of a substitute transportation service in the switching over the spur track of the industry. The Mitchell Coal Company did not receive an allowance for the switching service, but the railroad itself performed the switching to and from its mine. In the case of the Altoona Mines and others, the mine companies switched the cars from the mines to the station of the railroad company and received an allowance of 10c per ton for the performance of that transportation service. The Mitchell Coal Company contended that the 10c per ton was excessive and amounted to a rebate and also contended that it was discriminatory; because instead of making an allowance to the Mitchell Coal Company the railroads were performing the service. The court pointed out that the case involved first the reasonableness of the allowance to the Altoona and the other mines (p. 264):

> "For the courts are no more authorized to determine the reasonableness of an allowance for a haul over a spur track, between mine and station, than they are to pass upon the reasonableness of a rate for a haul, over a trunk line, between station and station."

The order sought by the coal company in that case would have required the court to find whether or not the allowance of 10c was a reasonable allowance for the service performed and, if not, to have fixed a reasonable allowance for the performance of that service. It would also have required the court to have found whether or not the failure to make an allowance to the Mitchell Company constituted an unreasonable discrimination and preferential practice under the act. We have presented no such proposition as that to this court.

The next case cited is that of *Loomis v. Lehigh Valley Railroad Company*, 240 U. S. 43. It involved the question of requiring the railroads to furnish grain doors and bulkheads in cars used in the transportation of form products in bulk. The rate schedules covering the products made no reference to allowances for grain doors and bulkheads. The question presented was whether the court could so modify the existing rules and regulations as to require the carriers to furnish grain doors and bulkheads. Necessarily this required the court to legislate with respect to the existing rules and regulations and to isue an order that would require the carriers to modify and change their existing rules so that they would require the carriers to furnish grain doors and bulkheads. The court stated (p. 48):

> "No serious dispute exists concerning the facts. The applicable duly-filed interstate rate schedules made no reference to allowances for grain doors or bulkheads, and the circumstances under which these were installed, together with their cost, are not controverted. Whether there was jurisdiction in

> the state court to pass upon the carrier's liability incident to the interstate traffic is the sole point demanding consideration."

The Interstate Commerce Commission had expressly ruled that the carriers in connection with their interstate tariffs could not at their own expense furnish grain doors and bulkheads. We quote (p. 50):

> "On June 1, 1908, before this proceeding was begun, the Interstate Commerce Commission ruled: 'A carrier may not lawfully reimburse shippers for the expense incurred in attaching grain doors to box cars unless expressly so provided in its tariff.' (Conference Ruling No. 78.)"

Since the Commission had ruled that the tariffs must contain specific provisions with respect to the furnishing of grain doors and since it was an admitted fact in that case that the published tariffs did not so provide, it is clear that the *Loomis Case* involved a proposition of the court legislating with respect to freight rate matters. In the instant case there is no modification whatever needed in connection with the existing rules, rates and regulations. The carriers are operating under their existing rules and are furnishing equipment and transporting the commodities which would otherwise move through the Port of Brownsville except for the reason that petitioner, Missouri Pacific, has refused to transport these commodities under the published rates.

One of the most recent decisions of this court was in *P. P. Brown & Son v. Louisville & Nashville Ry.* 299 U. S. 393. The same contention was made in that case

that is now made by petitioner and the court answered it as follows (p. 398):

> "The shippers contend that the construction given to the rule by the commission is conclusive, because preliminary resort to the commission was necessary. Texas & Pacific Ry. Co. v. American Tie & Timber Co., Ltd., 234 U. S. 138, 34 S. Ct. 885, 58 Ld. Ed. 1255; Loomis v. Lehigh Valley R. R. Co., 240 U. S. 43, 36 S. Ct. 228, 60 L. Ed. 517; Northern Pacific Ry. Co. v. Solum, 247 U. S. 477, 38 S. Ct. 550, 62 L. Ed. 1221. They argue that such preliminary resort was necessary, since the interpretation and application of the rule involved (a) the exercise of sound administrative discretion as to technical and intricate matters of tariff application and the relation of tariffs one to another; (b) the reasonableness of a practice of routing as between higher and lower-rated routes; and (c) uniformity in the application of rates, which is the paramount purpose of the Interstate Commerce Act. But that argument is not sound. To determine whether the rule was applicable to the several shipments does not call for, or indeed permit, the consideration of any of these matters. The simple question for decision, as to each shipment, is whether there existed 'published through rates' 'in effect from point of origin to destination,' the determination of that question requires ordinarily merely the examination of the tariffs. The inquiry would, in all respects be like that commonly made by courts when called upon to construe and apply any other document. This is not a case like Standard Oil Co. (Indiana) v. United States, 283 U. S. 235, 238, 239, 51 S. Ct. 429, 430, 75 L. Ed. 999, where there was required 'consideration of matters of fact and the application of expert knowledge for the ascertainment of the technical meaning of the words and a correct appreciation of a variety of incidents affecting their use.' Here, the shippers might have brought their action at law without resort to the commission."

In a like manner, the simple question here presented for decision is as to each shipment, whether or not there is a published rate and whether or not the act obligates the appellees to transport under those rates. In a like manner, the inquiry in the case now presented to the court would, in all respects, be like that commonly made by the courts when called upon to construe and apply any other document.

In *Macon D. & R. Ry Co. v. General Reduction Co.*, 44 Fed. (2d) 499 (certiorari denied, 283 U. S. 821, there is a discussion of the issue here involved.

Pennsylvania Railroad Co. v. Puritan Coal Mining Co., 237 U. S. 121 showed the proper distinction that should be made in regard to cases in which the courts have jurisdiction and in which the jurisdiction rests solely with the Interstate Commerce Commission. At pages 131-132 the criterion is set forth:

> "But it must be borne in mind that *there are two forms of discrimination,—one in the rule and the other in the manner of its enforcements; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule.* In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission. It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the

> Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States courts of competent jurisdiction, as provided in paragraph 9.
>
> "But if the carrier's rule, fair on its face, has been unequally applied, and the suit is for damages occasioned by its violation or discriminatory enforcement, there is no administrative question involved, the courts being called on to decide a mere question of fact as to whether the carrier has violated the rule to plaintiff's damage. Such suits, though against an interstate carrier for damages arising in interstate commerce, may be prosecuted either in the state or federal courts." (Italics ours.)

Substantially similar to this case (Pennsylvania Railroad Co. v. Puritan Coal Co.) are *Illinois Central Ry. Co. v. Mulberry Hill Coal Co.*, 238 U. S. 275; *Pennsylvania Ry. Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120; *Eastern Railway Co. of New Mexico v. Littlefield*, 237 U. S. 140. The distinction between the different authorities is found in this question: Was there an existing duty to be performed by the common carrier and a corresponding established right of the shipping public that could be shown by an existing published tariff, rule or regulation, or was it necessary in order to create such right of the shipping public that some note or rule be changed, modified or established? In the instant case, respondents ask only for the enforcement of the duty of the common carrier as shown by existing published tariffs, rules and regulations.

The duty upon connecting carriers to furnish equipment is joint. The Commission had before it this point in

Huerfano Coal Co. v. Colorado & Southeastern Ry., 28 I. C. C. 502 and stated (p. 506):

> "It is the view of the Commission that each carrier subject to the act is charged with the duty of furnishing cars to the industries located upon its line. *In the case of through routes composed of two or more carriers the obligation to furnish cars for transportation over such through routes is joint upon the carriers therein.* The law of this case, therefore, is that the Colorado & Southeastern Railroad, so long as it is to be considered as a common carrier, has the duty of furnishing cars for shipments between points on its line if there are any such shipments. Its obligation to furnish cars for shipments to points upon the lines of its connections is joint with such connections, and it cannot be relieved of its portion of such joint liability by any contract with such connections." (Italics ours.)

In *Campbell River Creek Coal Co. v. A. A. R. R. Co.*, 29 I. C. C. 682, 33 I. C. C. 558, it was contended that the railroad upon which the industry was located was obligated to furnish all the cars to the industry on its rails. Of this contention the Commission stated (p. 562):

> "Defendants argue that *its* (referring to the Campbell River R. R.) obligation is to furnish all cars needed, but this is not the requirement imposed by the act. While the responsibility to the shipper of furnishing a proper supply of cars rests upon the road upon which the shipper is located and the traffic originated, the originating line, as between it and its connections, does not necessarily rest under the burden of supplying all cars which may be required for transportation over through routes under joint rates." (Parentheses ours.)

Likewise, see *United Collieries v. Southern Railway Co.*, 96 I .C. C. 338.

The case of *Chicago, Rock Island & Pacific Railway Co. v. United States*, 284 U. S. 80 gives an excellent discussion of the car hire and interchange of equipment rules. With respect to the duties of the short lines to furnish cars it was said (p. 97):

> "Short lines, as well as trunk lines, participating in joint rates, must furnish their share of the equipment. *If they do not own cars, they must rent them.* The Commission itself has pointed out very clearly the basis for this requirement." (Italics ours.)

That case further found that the order of the Commission was in the scope of the statutory powers. At page 91 the court stated:

> "That the order of the Commission falls within the scope of its statutory powers is clear. Interstate Commerce Act, Section 1, subds. 10-14, as amended by Transportation Act, 1920, c. 91 Sec. 402, 41 Stat. 456, 476, U. S. C. title 49, Sec. 1, (10) to (14), 49 U. S. C. S. Sec. 1 (10-14) Subdivision (14) provides: 'The Commission may, after hearing on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this chapter, including the compensation to be paid for the use of any locomotive, car, or other vehicle not owned by the carrier using it, and the penalties or other sanctions for non-observance of such rules, regulations or practices."

Again on the same page, the Supreme Court stated:

> "Nor is it disputed *that under the law*, in the operation of through rates, *common carriers subject to the Interstate Commerce Act may be obli-*

gated to permit their car equipment to be carried beyond their own lines." (Italics ours.)

In *Atlantic Coast Lines v. Smith Bros.*, 63 Fed. (2d) 747 (certiorari denied, 289 U. S. 761), the court specifically stated that the rule of the Interstate Commerce Commission fixing joint responsibility for violations of the Act for through routes where there are only combination of local rates has the approval of the court (p. 748). The court there cited the following cases in which that rule of the Commission had been approved. *Louisville & Nashville Ry. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U. S. 217, *News-Syndicate Co. v. New York Central Railroad Co.*, 275 U. S. 187; *Lewis-Simas-Jones Co. v. Southern Pacific*, 283 U. S. 654 and *Kanawha Black Band Coal Co. v. Chesapeake & Ohio Railroad*, 197 W. Va., 469.

Petitioners should not and cannot be allowed to escape their obligation to furnish equipment by the subterfuge of the saying by one that we have no equipment and by the other that our lines do not touch this point. The duty is a joint one and remains and prevails regardless of whether any equipment is owned or whether there is direct service by the line of the carrier. It was specifically said in *Pennsylvania Railroad Co. v. Sonman Shaft Coal Co.*, 242 U. S. 120 that the duty to furnish cars for the purpose of performing transportation is not qualified by the Interstate Commerce Act in any place except that

part of it dealing with the emergencies created by car shortages. The court stated:

> "It is only in times of car shortage resulting from unusual demand where other abnormal conditions, not reasonably to have been foreseen, that car distribution rules originating with the carriers can be regarded as qualifying or affecting the right of the shippers to demand and receive cars, commensurate in number with their needs."

There is nothing in the record in this case to show that there is now or will be an emergency created by car shortage.

Thus it is seen that with the case presented in its essentials that not only does the district court have jurisdicition over the question and power to issue its writ of mandamus to protect respondents in their rights but that the district court is the only tribunal to which respondents can apply for relief.

The attention of the court is particularly directed to the last two paragraphs on page 13 of petitioners' brief, reading as follows:

> "In the present case, 'the inquiry is essentially one of fact and one of discretion in technical matters.' The right of respondents to a supply of cars for the movement of their traffic is by no means absolute. At best, they are members of the shipping public and have no greater right to the available supply than other shippers in like circumstances. The circumstances, including the supply of each kind of cars available and the necessities of other shippers, must always be determined in the light of conditions existing at the time the demand is made. The complexity of the factors which must be taken

into consideration in passing upon the reasonableness of a demand for cars was shown by the testimony of the witness Levy (infra, pp. 27-29).

"Consideration must be given, when each demand is made, to the number and type of cars demanded; the requirements of other shippers for like cars at different points of origin; the prior right of shippers of perishables; the length of time the equipment demanded will be engaged in the service for which the demand is made; the location of the points where it will be released, and perhaps to other matters, 'for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable'."

The points made in the argument quoted could be made in any case where a shipper was seeking to enforce the rights under the law to have made available to him cars for the transportation of his freight. We are dealing here with no question of the car shortage particularly in view of the fact that the traffic would move in the same cars but over a different route (through Corpus Christi, in order that the petitioner, St. L. B. & M. Ry. Co. could have a longer haul). We are dealing here with ordinary normal conditions and if the conditions made by the petitioners in the argument above quoted be tenable, then the statute authorizing mandamus in such cases as this means absolutely nothing.

REPLY TO PETITIONERS' POINT III

Petitioners next assert that a mandamus does not properly lie in this case. Their complaint in this section goes rather to the form which a mandamus might take or the evidence which might be presented upon a hear-

ing and is wide of the discussion as to whether or not there is jurisdiction in the federal district court to *hear* a petition for a writ of mandamus. They present testimony from Mr. T. H. Levy the trustee and general superintendent of transportation in charge of car supply as to the difficulty and importance of his position and concluded with the theory that because of the rapid changes necessary at times to supply cars to different portions of the country that no court could supervise such an action. Petitioners could use this same argument if the case was before the Interstate Commerce Commission because the Commission itself cannot act from minute to minute to make plans. Thus logically as to supervision there is no difference between a court and the Commission in directing this service.

At page 35 of petitioners brief it is stated:

> "Several cases may be found in which, under Section 49, the writ of mandamus has been issued to compel a carrier to supply cars."

With petitioners admitting that under the specific section which this suit is brought that writs of mandamus are isued to compel carriers to supply cars, we will not trespass upon the court's time in distinguishing and pointing out the inconsistencies in the state court cases cited to support their contention or distinguish the cases cited as being decided upon this point in the federal court. Respondents have no other remedy than mandamus in a situation of this sort. It would not be futile to issue the writ as petitioners could and would obey its terms. They are complaining of a nebulous and phantom situation—

an extreme car shortage and emergency and further of the terms of as yet non-existent writs of mandamus. Such questions are irrelevant to any discussion of the jurisdiction of the federal district court to hear and grant a writ of mandamus.

Title 49, Article 49, U. S. C. A. reads as follows:

> "**MANDAMUS TO OBTAIN EQUAL FACILITIES FOR SHIPPERS.** The district courts of the United States shall have jurisdiction upon the relation of any person or persons, firm, or corporation, alleging such violation by a common carrier, of any of the provisons of the preceeding chapter, as prevents the relator from having interstate traffic moved by said common carrier at the same rates as are charged, or upon terms or conditions as favorable as those given by said common carrier for like traffic under similar conditions to any other shipper, to issue a writ or writs of mandamus against said common carrier, commanding such common carrier to move and transport the traffic, or to furnish cars or other facilities for transportation for the party applying for the writ: *Provided*, That if any question of fact as to the proper compensation to the common carrier for the service to be enforced by the writ is raised by the pleadings, the writ of peremptory mandamus may issue, notwithstanding such question of fact is undetermined, upon such terms as to security, payment of money into the court, or otherwise, as the court may think proper, pending the determination of the question of fact: *Provided*, That the remedy hereby given by writ of mandamus shall be cumulative, and shall not be held to exclude or interfere with other remedies provided by the preceeding chapter." (March 2, 1889, c. 382, §10, 25 Stat. 862.)

We repeat that if the contentions of petitioner as expressed in Point 3 of their argument are well taken, then the above quoted statute authorizing mandamus in cases such as this means absolutely nothing and is wholly unenforcible.

THE CASES CITED IN DISSENTING OPINION IN THE CIRCUIT COURT OF APPEALS

The dissenting opinion in the Circuit Court of Appeals contains three cases which the dissenting opinion asserts are determinative "beyond question" on the points here involved. (See Record, p. 151.)

With all respect to the learned justice rendering such dissenting opinion, we point out to the Court the very clear difference between such cases and the case here under consideration. The case of *L. & N. R. Co. v. Corey*, 54 Fed. (2d) 8, was very clearly a case involving an emergency situation, wherein, because of a shortage of cars, it was necessary for reasonable rules to be made with reference to the proper distribution of cars. The opinion in the case (page 9) states, among other things, as follows:

> "Plaintiff's claim is unique in the sense that he does not claim that defendant has discriminated against him, * * * or that there was an unexplained failure to supply cars in confessedly normal times * * * . The period was clearly an abnormal one of

great car shortage. The railroads had been but recently returned from Federal control. On April 1, 1922, a strike was declared by Union coal miners east of the Mississippi and north of the Ohio River, and on July 1, 1922, the railway shop men declared a strike upon practically all railroads. These events cooperated vastly to increase the number of mines to be served by the defendant and to decrease the number of cars available for such service."

The opinion continues on page 10 in part as follows:

"The extent and nature of the emergency have been noticed judicially in Avent v. U. S., 266 U. S. 127, 45 S. Ct. 34, 69 L. Ed. 202, and by the Interstate Commerce Commission in Ayrshire Coal Company v. Southern Railway Company, 96 I. C. C. 167. * * *

It is unnecessary for us to here determine the precise scope of the common-law duty to provide adequate facilities, or whether the profession of a common carrier extends beyond that it will serve all who apply, without discrimination, to the maximum extent of its ability, in view of the equipment it has."

The opinion in the case above referred to shows very clearly that it is in no manner determinative of the points involved in the present case.

Another case cited in the dissenting opinion was the case of *Carrollton Excelsior & Fuel Company, Ltd. v. N. O. & N. E. R. Co.*, 69 Fed. (2d) 691. The opinion in this case, incidentally, was delivered by the same Honorable Judge who delivered the dissenting opinion in the present case. What this case actually involved is well shown

by the following excerpt from the opinion itself (see page 692):

> "The district judge thought the case involved primarily the investigation into and the determination of the reasonableness of rate and practices absolutely and in relation, interstate and intrastate. He thought it peculiarly one for the primary jurisdiction of the Commission. He sustained the exception and pleas to the jurisdiction.
>
> "We think he was right. Plaintiff's suit is not as Price's was, American Railway Express Company v. Price Bros. (C.C.A.) 54 Fed. (2d) 67. A suit to recover overcharges resulting from the wrong application of published rates. Its suit questions the reasonableness of the rates in themselves and in their relation to others."

The difference between the point involved in the Carrollton case and the points involved in this case are so apparent as to require no comment.

Another case cited in the dissenting opinion is *U. S. Nav. Co., Inc. v. Cunard S. S. Co., Ltd.*, (C. C. A.) 50 Fed. (2d) 83. The question involved in that suit was whether the United States Shipping Board or the Federal Courts had jurisdiction of the complaint made by plaintiff of contracts which he alleged were monopolistic and arrived at by duress and coercion. The Shipping Act (Title 46 U. S. C. A., Sec. 814) provided that agreements could be made but must be approved or disapproved by the U. S. Shipping Board. The distinction between that case and the instant case is obvious. The basis of

the Cunard case is summed up by the Court as follows (p. 88):

> "If, as we believe, the foregoing analysis of the charges in the amended bill is correct, the gravamen of the cause of action in the case at bar was *the unreasonableness of the agreed rates of carriage*, which, had land carriers been concerned, would have been a matter requiring primary resort to the Interstate Commerce Commission." (Italics ours.)

We agree, if the question involved in this suit was the unreasonableness of some rule, rate or regulation, the primary jurisdiction would be vested in the Interstate Commerce Commission, but such is not the question presented in this case.

The Court itself based its decision upon another point, saying that the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 22) prescribed that nothing contained therein should

> " 'In any way abridge or alter the remedies * * * existing at common law or by statute, but the provisions of this Act are in addition to such remedies.' The Shipping Act, on the other hand, contains no clause preserving general legal and equitable remedies, but provides ample remedies of its own." (p. 88.)

Again, the Court stated upon the same page:

> "It thus seems evident that Congress has set up a standard for the shipping business quite different from that applicable to trade agreements affecting business on land."

It is reiterated on page 90:

> "But the Interstate Commerce Act preserved legal and equitable remedies, whereas the Shipping Act

> contains no such reservations' and prior resort should be had to it (the Shipping Board) as to all matters within its jurisdiction." (Parenthetical matter ours.)

We have no quarrel with the court's construction of the Shipping Act but we do note that there was a dissenting opinion by Swann, Circuit Judge, in that case. It is apparent that there are differences in the provisions of the Shipping Act and the Interstate Commerce Act, and no decision upon the Shipping Act is reputable authority upon an action brought under the Interstate Commerce Act, particularly a section that is directly contra to the provisions of the Shipping Act.

CONCLUSION

This case verly clearly involves the question of whether carriers may operate in a certain territory, have on file with the Interstate Commerce Commission tariffs covering such operations, accept such freight as they chose from certain shippers and certain localities in the course of their operations, and refuse to furnish transportation service to other shippers or other localities, even though there are tariffs on file with the Interstate Commerce Commission applying to the furnishing of such transportation service.

The carriers in this case have refused and are refusing to do three things:

a. Handle the movement of cars under the tariffs in question even when the cars belong to other railroads and are tendered to them loaded for shipments.

b. Furnish to the shippers herein involved reasonable equipment for the transportation of their commodities.

c. Handle on a return trip from Mexico cars destined to the port of Brownsville although they will handle such cars from Mexico to any other point in the United States.

The case very clearly involves the question of whether carriers operating as above referred to may, through the refusal to furnish transportation service, practically destroy certain shippers or a certain port, and this in spite of the fact that great sums of money have been spent upon the construction of the facilities at the port.

Regardless of the different contentions advanced by petitioners two facts stand as practically admitted—*a*, the freight involved must and will move in some way and in substantially the same equipment regardless of how it moves. If it moves in a manner satisfactory to petitioners, they have no objection to furnishing the equipment and for that matter raise no objection even to permitting the equipment to go to Mexico.

b. The sole reason for the petitioners refusing to furnish transportation service to respondents is that they desire to force traffic to move via another route so that

out of the handling of such traffic they may receive greater revenue.

It is respectfully submitted that the decision of the Circuit Court of Appeals should be affirmed.

Respectfuly submitted,

A. B. COLE,
of Rentfro & Cole,
Brownsville, Texas,

A. L. REED,
CARL B. CALLAWAY,
of Callaway & Reed,
Dallas, Texas,
Attorneys for Respondents, Brownsville Navigation District of Cameron County,
F. A. Lallier, J. G. Philen, Jr.

Dated: February 17, 1938.
Address: CALLAWAY & REED,
1902 Santa Fe Building,
Dallas, Texas.

Copies of this brief have been furnished to and served upon the Honorable Robert H. Kelley, attorney for Guy A. Thompson, Trustee, and The St. Louis, Brownsville and Mexico Railway Company and the Honorable John P. Bullington, attorney for Port Isabel & Rio Grande Valley Railway Company.